Supreme Court, U.S.
FILED

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01-93 JUL 16 2001

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Docket No. _____

In The

Supreme Court of the United States of America

October Term, 2001

IN THE MATTER OF
Nha Khiem Tran,
Petitioner,
v.
United States of America,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Nha Khiem Tran, Pro Se
48793-079 #E
P. O. Box 7000
Texarkana, Texas 75505-7000

33 PP

QUESTION PRESENTED

I. Federal Rules of Criminal Procedure 12 states:

> "Pleading and motion before trial; defences and objections based on defects in the Indictment or Information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the Court at any time during the pendency of the proceeding)";

in this case the Fifth Circuit dismissed the Appeal for lack of pendency of proceedings and jurisdiction.

The question presented in this case is during the 1944 Adoption and the subsequent 1974 Amendment did pendency change to mean only Pre-Trial, or as the Fifth Circuit and other District and Circuits have decided, does it mean, at any time the case is pending, or at any time.

Does the Circuit splits violate the Fifth Amendment Due Process Clause of the United States Constitution.

PARTIES

Petitioner Nha Khiem Tran

Respondant United States of America

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PETITION FOR A WRIT OF CERTIORARI

Nha Khiem Tran, respectfully Petitions this Court for a Writ of Centiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit (App. 1) is unreported. The opinion of the District Court (App. 2) is unreported

JURISDICTION

The judgement of the Fifth Circuit Court of Appeals was issued on April 18, 2001 and as a mandate on May 10, 2001. The jurisdiction of this court is invoked pursuant to 28 U. S. C. 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the United States Constitution provides in pertinent part: no person shall be * * * deprived of * * * liberty * * * without Due Process of Law;

Federal Rules of Criminal Procedure 18 U. S. C. 12(b) provides in pertinent part:

> Pleadings and motion *** (b) any defence, objection or request *** (2) (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings);

STATEMENT

Petitioner was convicted of the Federal crime of Conspiracy to Possess with Intent to Distribute 3,4 Methylenedioxy-amphetamine 21 U.S.C. 841(a)(1) and (b)(1)(c) and 21 U.S.C. 846. On February 28, 2000 Petitioner filed a 28 U.S.C. 2241

in the Eastern District of Texas. While the 28 U.S.C. 2241 (App. 3) was pending, Petitioner filed a motion pursuant to 18 U.S.C. Federal Rules of Criminal Procedure 12(b)(2) in the Southern District of Texas, Houston Division on August 28, 2000 (App. 4 Page-2). On September 15, 2000 the Honorable Lynn N. Hughes United States District Judge issued an order granting him authority to file his 12(b)(2) motion and in the same order denying the motion (App. 2).

On September 29, 2000 Petitioner filed his Notice of Appeal to the United States Court of Appeals for the Fifth Circuit See (App.5).

On November 7, 2000 the United States Court of Apeals remanded to the District Court for the limited finding if Petitioner properly filed his Notice of Appeal pursuant to the Mail Box Rule See (App.6).

On December 15, 2000 the Honorable Lynn N. Hughes United States District Judge filed an opinion that Petitioners Notice of Appeal was timely filed. See (App.7).

On February 7, 2001 Petitioner timley filed his Appellants Brief.

On March 8, 2001 the United States Attorney filed a motion to dismiss for failure of the District Court to have jurisdiction to address Petitioners 12(b)(2) Motion. See (App.8, page 4)

First, the United States Attorney agrees that Rule 12(b)(2) permits an attack on the sufficiency of an Indictment at any time. See (App.8 Page-4).

Second, the United States Attorney completely ignored that Petitioner in his 12(b)(2) Motion pointed out that his 28 U.S.C. 2241 was pending in the Eastern District of Texas.

The United States Attorney completely ignored that Petitioner in his 12(b)(2) motion pointed out that his 28 U. S. C. 2241 was pending in the Eastern District of Texas.

On April 18, 2001 the United States Court of Appeals for the Fifth Circuit issued an order granting the Governments motion to dismiss the Appeal. See (App.1) the Fifth Circuit in making this decision squarely conflicts with the 5th Amendment of the United States Constitution (Due Process), its own Circuit case law, and other Circuits decision that the sufficiency of the Indictment, or lack of jurisdiction can be raised at any time.

REASONS FOR GRANTING THE PETITION

For more than 40 years the Federal Courts have grappled with the meaning of (other than lack of jurisdiction or failure to state an offense) as articulated in the 1944 Adoption of this Courts adoption of Federal Rules of Criminal Procedure 12(b)(2). One area of particular confusion has been the Application of Federal Rules of Criminal Procedure 12(b) as can be seen from this Courts 1974 Amendment and 1975 Enactment which still today is causing legal uncertainty as to when is pendency of the proceeding. That "uncertainty" has ripened into a square conflict among the Circuits over Due Process of 12(b)(2) and warrants immediate review by this Court.

As the United States Attorney has acknowledged, the Courts of Appeal are deeply divided over during the pendency of the proceedings, and at any time, which may be applied as they see fit. As this case demonstrates, for some Courts the Application of 12(b)(2) is an empty exercise that permits the Courts to use 12(b)(2) as they see fit, to deprive the Petitioner or others of Due Process. The Fifth Circuit Court of Appeals in this case has also nullified the Due Process effect in the Statue. If the Due Process limitations of the V Amendment can be dodged so easily, then the Constitution is nothing more than hollow words with no meaning. The decision below, and others like it, permit the Courts at their whim to bend as a reed in the wind, whichever way it blows at the moment.

The many Federal Appellant decisions addressing Federal Rules of Criminal Procedure 12(b)(2) confirm the exceptional importance of this issue. Moreover the reasoning of the decision below would appear to authorize the Fifth Circuit to make a ruling contradictory to Fifth Circuit law, deprive Petitioner of his Due Process rights at the whim of the Fifth Circuit, and be in conflict with other circuits. This Court should grant review to foreclose further deprivation of Due Process and Circuit conflict.

I. The Federal Court are divided over when a Federal Rule of Criminal Procedure 12(b)(2) Motion can be filed.

The Federal District Courts and Federal Courts of Appeals are sharply divided even within the Circuits themselves over when a Federal Rules of Criminal Procedure 12(b)(2) Motion can be filed.

The United States Attorney explicitly acknowledges (App. 8 Page-4) that this argument conflicts with Fifth Circuit decision and with other Circuit decisions.

The Second Circuit in the United States v. Ivic, 700 F2d 51,54 N.5 (2nd cir 1983) "Shall be noticed by the Court at any time during the pendency of the proceedings. The term pendency of the proceedings has been consistently construed to encompass an Appeal".

"* * * may be raised for the first time on Appeal * * *"
United States v. Wexler, 621 F2d 1218, 1223 (2nd cir 1980).

"* * at any time during the pendency of the proceeding * * "
Government of the Virgin Island v. Greenidge,
600 F2d 437, 439 N.2 (3rd cir 1979).

"* * * may be raised any time during the proceedings"
U.S. v. Sutton, 961 F2d 476, 478 (4th cir 1992).

"* * * can be raised any time during the pendency of the proceedings * * *".
United States v. Oberski, 734 F2d 1034, 1035 (5th cir 1984).

Compare;
"* * * can be made at any time * * * *".
U.S. v. Fitzgerlad, 86 F3d 218, 221 (5th cir 1996).

"* * * at any time * * *"
U.S. v. Campos-Asenio, 833 F2d 506, 508 (5th cir 1987).

"* * * at any time contest an Indictment * * *"
U.S. v. Guzman-Ocampo, 236 F3d 233, 236 (5th cir 2000).

"* * * may be raised at any time"
U.S. v. Wilson, 884 F2d174, 179 (5th cir 1989).

Then compare;
"* * * which can be made at any time"
United States v. Clark, 646 F2d 1259, 1262 (8th cir 1981).

"* * * at any time during the pendency of the proceedings".
United States v. Wolff, __ F3d __ 2001 WL 194511 (8th cir 2001).

"* * *which can be raised at any time".
United States v. Pheaster, 544 F2d 353, 361 (9th cir 1976).

"* * * may be raised at any time * * *.
U.S. v. Stewart, 727 F. Supp 1068, 1069 (N.D. Tex 1989).

The second Circuit rule is it may be raised for the first time on Appeal, by contrast, the Third and Fourth Circuit rule is it may be raised at any time during the pendency of the proceedings. Whereas the Fifth and Eighth Circuit has two rules A). At any time during the pendency of the proceedings or, (B). at any time. Petitioner is sure that with his limited access to law Books that there are probably other conflicting opinions.

By contrast Petitioner reviewed Blacks Law 7th Edition for "Pendency" Page 1154 and "Proceeding" Page 1221 and is assured that his 28 U.S.C. 2241 which is a further step in his criminal case and not a seperate Civil action, that there was pendency. Petitioner is not agreeing there

needs to be pendency, only that the record speaks to pendency. By reviewing the present case this Court could resolve this conflict among the Circuits on when a 12(b)(2) can be filed.

In sum the Federal District Court and the Courts of Appeals are deeply divided over the Application of 12(b)(2) which affect Due Process. The conflict in the Circuits is not surprising as there is lacking a dearth of Supreme Court cases on this issue. The two cases which are not on point with Petitioner is *Davis v. United States* , 411 U. S. 233 (1973) which deals directly with the waiver section of 12(b). This court was careful to point out in Davis that it was dealing with the group of defenses and objections which must be raised by motion, failure to do so constituting a waiver. (see 411 U. S. 236)

In *Davis v. United States* reference was made to the other case *Shotwell MFG Co. v. United States*, 371 U.S. 341 (1963) which also dealt with the waiver issues of 12(b)(2).

Petitioner asks this Court to grant review to resolve ths fully ripened conflict.

II. The (other than it fails to show jurisdiction in the Court or to charge an offense which objections shall be noticed by the Court at any time during the pendency of the proceedings); has a procedural Due Process meaning.

Further review is warranted for the additional reason that the Fifth Circuit's decision is in conflict with the plain meaning of the words within the ( ) of 12(b)(2) and conflicts with other Circuits and District Court decisions. The Fifth Circuit Court of Appeals in this case fundamentally misinterpreted 12(b)(2), and has created a literal loophole to exercise judicial discretion over a Due Process issue, or for that matter at the will of the Court instead of the will of the law.

Moreover this Court should accord an interpretation of the words within ( ) of 12(b)(2) both with its text and the

principles set forth by this Court in proposing its passage.

This Court in promulgating rule 12(b)(2) placed the ( ) and the words therein to distinguish it from the rest of 12(b)(2) and to give it a separate meaning. This Court in its 1974 Amendment stated that subdivision (b)(1) and (2) are restatements of the old rule. The old rule is the 1944 Adoption which set forth the words (other than lack of jurisdiction or failure to state an offense, Etc).

The Fifth Circuit Court of Appeals believed it could disregard the words in the procedural rule 12(b)(2). But Due Process does not authorize this kind of bootstrapping, to the contrary those words in 12(b)(2) and the words in the ( ) have a meaning that was disregarded by the Fifth Circuit.

The United States Government reliance on the issue of lack of pendency is just a means of conjuring up a reasoning that does not comport with Due Process of 12(b)(2). Promiscuous use of a blind eye to the words of the ( ) of 12(b)(2) would permit Federal Judges to violate Due Process.

The Fifth Circuit De Minimis approach of what is the same thing, interpreted into nullity, what is in the ( ) of 12(b)(2). That reasoning misuses the words in the ( ) of 12(b)(2).

The Fifth Circuit dismissal based upon the Government argument that the proceeding were no longer pending after the District Judge granted the filing, cannot be reconciled with the plain meaning of 12(b)(2). Under any reasonable interpretation of pendency of proceedings there was pendency at the time the 12(b)(2) was filed.

It would make no sense to say that a Habeas Corpus is a further step in a criminal case and not a separate Civil action, If the Courts were free to interpret the rule in such a way to remove it, but that is what the Fifth Circuit did here.

III. The issue presented is recurring and of great practical importance.

The conflicts among the District Courts, Circuits and inner Circuits over Federal Rules of Criminal Procedure 12(b)(2) is of great practical, doctrinal and procedural Due Process significance. 12(b)(2) itself is an important part of the burgeoning Federal Code of Criminal Procedures, and is the subject of frequent litigation in the Federal Courts. A decision in this case would provide guidance to the lower Courts that since the 1944 Adoption and subsequent Amendments that procedural Due Process demands an interpretation of compelled limiting function.

Resolving the issue that has divided the District and Circuit Courts, would give the Court the opportunity to provide uniformity in this aspect of procedural Due Process.

As the depth of the conflict among the District and Circuit Courts demonstrates , the Federal Courts frequently must define the Constitutional Due Process of 12(b)(2). If not resolved here, the question presented in this Petition will continue to recur regularly at all levels of the Federal Courts, with the outcome in each case depending on the location of the Courthouse and the whim of the Judges therein.

Finally, the question presented in this case is exceptionally important because of the commands of Amendment V of the United States Constitution "* * * nor be deprived of life, liberty or property, without Due Process of law;".

"A protected liberty or property interest cannot be denied without Constitutionally adequate Due Process". Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950).

It is clearly established that Amendment V provides both procedural and substantive Due Process protection from actions of the Federal Government. That is the reason

for the Federal Rules of Criminal Procedure which are now being thwarted by the Federal Courts.

The three elements that must be established on procedural Due Process claims are:

1). A Constitutionally protected interest in life liberty or property. Petitioner is currently restrained in his liberty.

2). Governmental deprivation of that interest. The Government having their motion granted to dismiss is depriving the Petitioner of that right.

3). The Constitutional inadequacy of procedures accompanying the deprivation. Petitioner has shown the verying degrees of decisions on 12(b)(2) and the inconsistency of the Federal Courts in applying 12(b)(2). See Matthews v. Eldridge, 424 U.S. 319, 335.

The Federal Courts continue to press against the Constitutional boundaries of Due Process in this area of 12(b)(2), a matter of some considerable concern. Federal Courts that do not adequately and fairly enforce the Federal Rules of Criminal Procedure, exacerbate these deleterious effects on the Citizens. The adverse effect of such Judicial uncertainty of Due Process is an unconstitutional extension of Federal power that is ripe for review by this Court which they can fully remediate.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully Submitted.

Nha Tran

Nha Khiem Tran

APPENDIX

APPENDIX-1 OPINION OF THE FIFTH CIRCUIT COURT OF APPEALS FILED APRIL 18, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-20892

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

NHA KIEM TRAN, also known as David Tran
Defendant - Appellant

Appeal from the United States District Court for the
Southern District of Texas, Houston

Before SMITH, BENAVIDES, and DENNIS, Circuit Judges.
BY THE COURT:

IT IS ORDERED that the motion of appellee to dismiss the appeal is (GRANTED.)

IT IS FURTHER ORDERED that the appellee's motion for an additional seven (7) days from the date of this court's order to file its brief is (DENIED as unnecessary.)

APPENDIX-2 OPINION OF THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS FILED SEPTEMBER 15, 2000

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

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UNITED STATES OF AMERICA	)
	)
versus	)
CRIMINAL H-89-135-01	)
	)
NHA KIEM TRAN	)

Order

1. Nha Keim Tran may file his motion to dismiss under Rule 12(b)(2).
2. Nha Keim Tran's motion to dismiss is denied.

Signed September 13, 2000, at Houston, Texas.

" s/

Lynn N. Hughes
United States District Judge

APPENDIX-3 PETITIONERS 28 U.S.C. 2241
EASTERN DISTRICT OF TEXAS
FILED ON FEBRUARY 28, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

Nha Khiem Tran	)	
	)	
Petitioner	)	
	)	
	)	
v.	)	Case No. 500VC057.
	)	
	)	
N. L. Conner (Warden)	)	
	)	
Respondent	)	
	)	
_____	)	

PETITIONER FOR A WRIT OF HABEAS CORPUS
PURSUANT TO 28 USC 2241, 2242, 2243,
2244 AND 28 USC 1651

Nha Khiem Tran Pro-Se
48793-079 #E
P.O. Box 7000
Texarkana, Texas 75505-7000

APPENDIX-4 PETITIONERS 12(b)(2) MOTION
SOUTHERN DISTRICT OF TEXAS
FILED AUGUST 28, 2000

Nha Khiem Tran
48793-079 #E
P.O. Box 7000
Texarkana, Texas 75505-7000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Of America	)	
Plaintiff	)	
v.	)	Criminal No: H-89-135
Nha Khiem Tran	)	
Nhan Khiem Tran	)	
Dong Ho	)	
Defendants	)	
	)	

DEFENDANT NHA KHIEM TRAN MOTION
FOR LEAVE OF COURT TO FILE THE
ATTACHED MOTION PURSUANT TO FEDERAL
RULES OF CRIMINAL PROCEDURE 12(b)(2)

Comes now, Nha Khiem Tran, Defendant, and moves this Court for leave to file the attached Motion pursuant to Federal Rules of Criminal Procedure Rule 12(b)(2).

Lawernce D. Kenemore Jr
Legal Advocate
26175-077 #G
P.O. Box 7000
Texarkana, Texas 75505-7000

"s/ Nha Tran"

Nha Khiem Tran

Nha Khiem Tran
48793-079 #E
P.O. Box 7000
Texarkana, Texas 75505-7000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Of America Plaintiff	)	
v.	)	Criminal No: H-89-135
Nha Khiem Tran Nhan Khiem Tran Dong Ho Defendants	)	

DEFENDANT NHA KHIEM TRAN MOTION TO DISMISS HIS INDICTMENT PURSUANT TO FEDERAL RULES OF CRIMINAL PROCEDURE 12(b)(2)

I

JURISDICTION

This Court has jurisdiction to hear and adjudicate this argument and to dismiss the indictment pursuant to Federal Rules of Criminal Procedure 12(b)(2).

Defendant's case currently has pending a 28 USC 2241 in the Eastern District of Texas Texarkana Division.

APPENDIX-5 PETITIONERS NOTICE OF APPEAL TO THE FIFTH CIRCUIT FILED SEPTEMBER 29, 2000

Nha Khiem Tran
48793-079 #E
P.O. Box 7000
Texarkana, Texas 75505-7000

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Of America Plaintiff	)	
v.	)	Case No: H-89-135-01
Nha Khiem Tran Defendant	)	

NOTICE OF APPEAL

Comes now, Nha Khiem Tran, Defendant, and files this Notice of Appeal to the United States Court of Appeals for the Fifth Circuit on the final Appealable Order signed by Judge Lynn Hughes on 9-18-2000 denying Defendants Motion pursuant to Federal Rules Of Civil Procedure 12(b)(2).

"s/ Nha Tran"

Nha Khiem Tran

APPENDIX-6 FIFTH CIRCUIT REMAND TO THE SOUTHERN DISTRICT OF TEXAS FILED NOVEMBER 7, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-20892
USDC No. H-89-CR-135

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

NHA KIEM TRAN, also
known as David Tran,
(48793-079)

Defendant-Appellant.

Appeal for the United States District Court
for the Southern District of Texas

Before JONES, STEWART, and DENNIS, Circuit Judges.

BY THE COURT:

This court must examine the basis of its jurisdiction on its own motion if necessary. United States v. Lister, 53 F.3d 66, 68 (5th cir. 1995). Rule 4(b) (1) (A), Fed R. App. R., requires that the notice of appeal by the defendant in criminal case be filed within 10 days of entry of the judgment or order from which appeal is taken. In this case in which judgment, including sentence, was entered in 1992, the district court entered an order on September 15, 2000, denying the defendant's motion to dismiss the indictment (purportedly filed pursuant to Rule 12(b)(2), Fed. R. Civ. P.) Because the order denying the motion

to dismiss the indictment is a post-judgment ruling in the criminal case, the final day for filing a timely notice of appeal from that order was September 25, 2000. The defendant's pro se notice of appeal is timely filed if deposited in the institution's internal mail system on or before the last day for timely filing. See Fed. R. App. P. 4(c) (1). Because it cannot be determined in this case whether the defendant delivered the notice of appeal to prison offieial on or before September 25, 2000, the case must be remanded to the district court to make this determination. See Thompson v. Montgomery, 853 F. 2d 287, 288 (5th Cir. 1988). Upon making this determination, the district court shall return the case to this court for further proceedings, or dismissal, as may be appropriate.

REMANDED.

APPENDIX-7 DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS OPINION
FILES DECEMBER 15, 2000

==========

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

==========

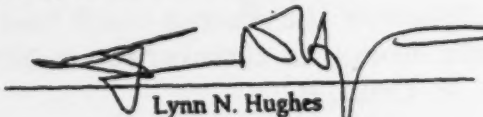
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
versus	)	CRIMINAL CASE H-89-135-01
	)	
NHA KIEM TRAN,	)	
	)	
Defendant.	)	

Opinion

One might expect that if Nha Kiem Tran certified his notice of appeal as being placed in the Texarkana prison mail on Friday, September 22, 2000, and the Houston clerk's office entered it on September 29, 2000, it would be more probable than not that the notice of appeal was mailed by September 25, 2000, the last day for filing a timely notice.

The district clerk obtained the envelope in which Tran mailed his notice of appeal. It shows two September 25, 2000, postmarks by the U.S. postal service and one prison mail room stamp dated September 23, 2000. Tran's notice of appeal was timely filed.

Signed December 12, 2000, at Houston, Texas.

" s/  "

Lynn N. Hughes
United States District Judge

APPENDIX-8 UNITED STATES ATTORNEY MOTION TO DISMISS FILED MARCH 8, 2001

IN THE
UNITED STATES COURT OF APEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	No. 00-20892
NHA KHIEM TRAN, Defendant-Appellant.	)	

GOVERNMENT'S MOTION TO DISMISS APPEAL

The United States of America, Plaintiff-Appellee ("the government"), files this motion to dismiss the appeal of Defendant-Appellant Nha Khiem Tran ("Tran"). Tran appeals the order of the district court (Hughes, J.) entered on September 15, 2000, denying Tran's motion to dismiss the indictment under Rule 12(b), Fed. R. Crim. P., filed by Tran on September 1, 2000 (1 R. 182, 183). Tran filed his notice of appeal on October 3, 2000 (1 R.185)

On November 12, 2000 this court remanded the case to the district court for a determination of whether Tran's notice of appeal was timely filed (1 R. 188). On December 15, 2000, the district court entered an order in which it found the notice of appeal to be timely filed (1 R. 189).

ISSUE

Whether the district court had jurisdiction to address Tran's motion to dismiss the indictment under Rule 12(b), Fed. R. Crim. P.

PROCEDURAL HISTORY

Tran was indicted in Houston on April, 10, 1989 and charged with conspiracy to possess with intent to distribute a controlled substance (amphetamines), and possession with intent to distribute, violation of 21 U.S.C. 846 and 841 (1 R. 2)[1]. On October 24, 1991, Tran was found guilty of the conspiracy charge, and on June 22, 1992 he was sentenced to 240 months in the custody of the Bureau of Prisons, a $10,000 fine, and a five-year term of supervised release (1R. 25,38). This court affirmed Tran's conviction on October 7, 1993 (1 R. 82). The Supreme Court denied Tran's application for a Writ of Certiorari on February 28, 1994 (1 R. 150).

On June 23, 1999, Tran filed a motion in the district court for a leave to file an out-of-time petition under 28 U.S.C. 2255 (1 R. 155). The district court denied the motion in an order entered on July 1, 1999 (1 R. 156). On August 28, 2000, Tran followed with a motion seeking permission to file a motion to dismiss under Rule 12(b), Fed.R.Cri.P. (1 R. 168). He then filed a motion to dismiss on September 1, 2000 (1 R. 182). The district court granted Tran's motion for leave to file a motion to dismiss but denied the motion to dismiss; the order was entered on September 15, 2000 (1 R. 183). This appeal ensued.

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[1]"R" referes to the record on appeal. The number immediately preceding the record references refers to the volume, and the number following refers to the page.

ARGUMENT

The district court had no jurisdiction to rule one Tran's motion to dismiss the indictment.

Tran claims the district court should have granted his motions to dismiss because the indictment was defective as it did not allege a quantity of amphetamine that he conspired to possess/distribute. In support of this argument, Tran relies on the Supreme Courts recent opinion in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), which held that a fact that increases a defendant's sentence beyond the statutory maximum penalty is an element and must be alleged in the indictment and proved beyond a reasonable doubt. The district court did not have jurisdiction to address the motion to dismiss.

Rule 12(b), Fed. R. Crim. P., permits an attack on the sufficiency of an indictment "at any time during the pendency of the proceedings." In this case, Tran's challenge to the indictment came well after the proceedings had terminated. Final judgment had been entered, and Tran's direct appeal had run its course.

In *United States v. Wolff*, __F. 3d__, No. 00-1018, 2001 WL 194511 (8th Cir. (Iowa) 2001), the defendant, like Tran, filed a prose motion under Rule 12(b) asserting that the district court lacked jurisdiction to sentence him because the indictment failed to alleged the quanity of drugs he possessed. Wolff argued that, even though his motion to dismiss came after judgment had been entered - he did not perfect a direct appeal - Rule 12(b) permits an attack on the sufficiency of an indictment at any time. The Eighth Circuit pointed out that the rule permits such a challenge "at any time *during the pendency of the proceedings.*" *Id.* Because final judgment had been entered and no direct appeal taken, the *Wolff* court held that "the proceedings were no longer pending," and the district court could not grant relief. *Id.* at *2.

In this case, Tran's appellate journey ended in February 1994 when the Supreme Court denied certiorari. When he filed his Rule 12(b) motion in September 2000, over six years later, "the proceedings were no longer pending." As such, the district court could not have granted the motion because it lacked jurisdiction.

It also should be pointed out that, if Tran's Rule 12(b) motion were construed to be petition under 28 U.S.C. 2255, no relief is available because the petition would have been out of time. Tran's petition for writ of certiorari was denied by the Supreme Court in February 1994. Under such circumstances, Tran would have been required to file a petition within one year of the denial of certiorari. *United States v. Thomas*, 203 F.3d 350, 355 (5th Cir. 2000). Because his pleading was filed over six years later, it was out of time.

CONCLUSION

Based on the foregoing, Tran's appeal should be dismissed. Should this court deny the government's motion to dismiss the appeal, the government requests an additional seven days from the denial to file its brief.

Respectfully Submitted,

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"s/ "

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